



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2003

Mr. Jeff Lopez
Assistant General Counsel
Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2003-7128

Dear Mr. Lopez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189028.

The Texas Department of Public Safety (the "department") received a written request for fourteen categories of information pertaining to a named state trooper. You indicate that most of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to section 552.101 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) You contend that the documents you submitted to this office as Exhibit A are made confidential under section 1701.306 of the Occupations Code. This section, which makes confidential declarations of medical condition and of psychological and emotional health, provides in part:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:
 - (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and
 - (2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306(a), (b) (emphasis added). We agree that the submitted Declaration of Psychological and Emotional Health is confidential under section 1701.306 of the Occupations Code. Consequently, the department must withhold this document pursuant to section 552.101 of the Government Code. With respect to the remaining forms in Exhibit A, we note that these documents do not indicate on their face what declaration the physician has made. Therefore, we are unable to determine whether these documents fall within section 1701.306(a) of the Occupations Code.

We note, however, that the remaining documents in Exhibit A constitute medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The submitted medical records must be withheld in accordance with the MPA unless the department receives the patient's signed, written consent specifying (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the documents in Exhibit A that constitute medical records.

You contend that the remaining information you submitted as Exhibit B, which the department obtained in connection with a conditional job offer medical examination, is made confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and thus must be withheld pursuant to section 552.101 of the

Government Code. The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. Even in instances where information does not reveal any specific information about an employee's medical conditions or medical histories, this office has nevertheless concluded even general information revealing the presence or absence of a pre-existing medical condition must be withheld from the public pursuant to the ADA. *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3-4 (Oct. 1, 1997) (Equal Employment Opportunity Commission determined that "medical information" for purposes of ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual"). After reviewing Exhibit B, we conclude that the department must withhold these documents in their entirety in accordance with the ADA.

In summary, the department must withhold the Declaration of Psychological and Emotional Health under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The submitted medical records in Exhibit A may only be released as provided under the MPA. The remaining information, which you have submitted as Exhibit B, must be withheld in its entirety in accordance with the ADA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/RWP/seg

Ref: ID# 189028

Enc: Submitted documents

c: Mr. Richard Martin P. Canlas
Attorney at Law
300 West Davis, Suite 560
Conroe, Texas 77301
(w/o enclosures)